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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR 29 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Section
4(g) of the Cable Television
Consumer Protection Act of 1992

)
)
) MM Docket No. 93-8
)
)

To: The Commission

COMMENTS OF HOME SHOPPING NETWORK, INC.

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SUMMARY OF ARGUMENT

Home Shopping Network, Inc. ["HSN"] introduced the home shopping entertainment format to over-the-air broadcasting in response to the Commission's Television Deregulation decision. That format embodies precisely the type of innovative experimentation which the Commission hoped deregulation might stimulate. Indeed, home shopping represents the first successful application of interactive television, and may serve as a model for additional consumer-oriented technological innovation. A decision that home shopping stations, which are a primary vehicle for

A home shopping entertainment format is not inherently incompatible with operation in the public interest. Stations may air home shopping entertainment programming and also broadcast significant public service programming which responds to community issues. It is a station's public service programming, not its entertainment programming, which controls the determination of operation in the public interest. Indeed, both the courts and the Commission have reviewed home shopping stations' entertainment and non-entertainment programming on several occasions and have concluded that it complies with the public interest. The content of entertainment programming is simply irrelevant to a determination of service in the

First, to determine that one class of broadcasters is not operating in the public interest by definition would constitute an impermissible, content-based distinction that the Supreme Court has repeatedly denounced.

Second, any disparate treatment of home shopping stations based on their "commercial speech" must be based on a distinction between commercial and noncommercial speech that is related to a legitimate interest. It is doubtful that the governmental interest here would be considered constitutionally legitimate.

Consideration of the three factors mentioned by the 1992 Cable Act also supports the home shopping stations' entitlement to mandatory carriage. First, those stations enjoy substantial audiences, demonstrated not only by viewership statistics but by the growth and popularity of HSN's home shopping entertainment format: HSN began broadcast operations only seven years ago and since that time has become affiliated with over 100 stations. Such growth would not have occurred if there were not substantial audiences for home shopping stations.

Second, there are no competing spectrum demands which are unique to home shopping-formatted stations. To the extent such station-specific demands may exist, the Commission's existing comparative renewal procedures were designed and are more than adequate to handle them. To the

extent there are general demands for the spectrum assigned to home shopping stations, those issues are appropriately resolved in rulemaking proceedings of general applicability.

And finally, over-the-air home shopping stations provide the most direct and substantial competition to cable home shopping services.

Congress premised must-carry rights on the need to ensure that over-the-air broadcast stations enjoy continued access to the local audiences which they are licensed and obligated to serve through programming. Home shopping stations have the same public service obligations as conventionally-formatted stations, and if they comply with those obligations -- a determination which is not based on entertainment programming -- they should have the same entitlement to must-carry rights.

In pursuing that entitlement, home shopping stations do not seek any advantage over their conventionally-formatted competitors. They seek only to be judged by the same public interest standards -- which do not evaluate the merit of entertainment programming -- as are applied to other stations.

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COMMENTS OF HOME SHOPPING NETWORK, INC.

Home Shopping Network, Inc. ["HSN"], by its attorneys, submits herewith its comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.^{1/}

Introduction

HSN is the largest broadcast electronic sales retailer in the United States. It was the first company in the country to offer an over-the-air broadcast home shopping service. This pioneering venture in interactive television -- perhaps a harbinger of future technological innovations - - was a response to the Commission's deregulation of television and its specific invitation to experimentation under a reduced regulatory regime.^{2/}

1/ Notice of Proposed Rulemaking, MM Docket No. 93-8, 8 FCC Rcd 660 (1993) ["Notice"].

2/ Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations, MM Docket No. 83-670, 98 FCC 2d 1076, 1104 (1984) ["Television Deregulation"], recon. denied, Memorandum Opinion and Order, 104 FCC 2d 358, 370

(continued...)

Until December 28, 1992, HSN was also the parent of the licensees of 12 television stations,^{3/} all of which carry the programming of the Home Shopping Club ["HSC"].

HSN provides home shopping program services to broadcast stations and to cable television systems. Two separate network services are provided to television broadcast stations. First, the HSN 2 network service is provided to the SKC Stations as well as to over 24 other television stations. This HSN 2 entertainment programming is divided into segments broadcast live with a host or hostess who presents merchandise available for purchase by viewers. Show hosts describe the merchandise one product at a time, conveying information concerning its quality, uses, attributes and prices. Viewers may order the merchandise by using a toll-free telephone number. The hosts also engage

2/ (...continued)
n.37 (1986) ["Television Deregulation Reconsideration"],
aff'd in part and remanded in part sub. nom., Action for
Children's Television v. FCC, 821 F.2d 741 (D.C. Cir.
1987).

3/ Until December 28, 1992, HSN was the parent of the licensees of Television Stations KHSX-TV, Irving, Texas; WYHS-TV, Hollywood, Florida; KHSB-TV, Alvin, Texas; WEHS-TV, Aurora, Illinois; WHSW-TV, Baltimore, Maryland; WHSH-TV, Marlborough, Massachusetts; WHSE-TV, Newark, New Jersey; WHSI-TV, Smithtown, New York (operated as a satellite of WHSE-TV); WQHS-TV, Cleveland, Ohio; KHSC-TV, Ontario, California; WBHS-TV, Tampa, Florida; and WHSP-TV, Vineland, New Jersey. On that date, HSN's stations were spun off to Silver King Communications, Inc. ["SKC"], a publicly-traded company. See FCC File Nos. BTCCT-920918KD, KF-KJ, KL-KN, KP-KT.

callers in spontaneous on-air discussions concerning the programming, the products and their previous home shopping experiences, and share personal chatter such as family anecdotes and recipes. All HSC programming is broadcast live.

The HSN 2 programming format provides affiliates with approximately four and one-half minutes per hour and three hours on Sunday morning for the presentation of local public service, public affairs, news, informational, religious and children's programming, as well as an additional two minutes per hour in which they may insert local advertising and/or public service announcements.^{4/}

HSN also provides another broadcast program service known as HSN 4 or HSN Spree to other television stations. This network program service provides the same type of entertainment, informational and home shopping programming (albeit different in content) as HSN 2. Affiliated stations have approximately four (4) minutes per hour for the insertion of local programming and/or commercials. While it is available 24 hours per day, HSN 4 (or Spree) serves primarily as a part-time service. HSN 4

^{4/} HSN programming is provided to affiliated stations pursuant to contracts that conform to provisions of Sections 73.658(a)-(e) of the Commission's Rules.

is carried on a full or part-time basis by approximately 70 television stations.^{5/}

Finally, HSN provides a home shopping service, HSN 1, to cable television systems. Unlike HSN's broadcast services, its cable service makes no provision for local insertion of public interest programming, and is supplied directly to cable headends via satellite.

This proceeding was implemented pursuant to Section 4 of the Cable Television Consumer Protection and Competition Act of 1992,^{6/} which added Section 614(g) to the Communications Act of 1934, as amended.^{7/} That provision requires the Commission to determine whether television stations affiliated with the home shopping broadcast networks are serving the public interest, convenience and necessity as a prerequisite to their qualification as local commercial television stations entitled to mandatory cable carriage rights under the 1992 Cable Act.

Nothing inherent in a home shopping format prevents full compliance with a broadcast station's statutory public interest obligations. The home shopping

^{5/} Approximately 43 low power television stations also carry HSN programming.

^{6/} Pub. L. No. 102-385, 106 Stat. 1460 (1992) ["1992 Cable Act"].

^{7/} 47 U.S.C. § 534(g) ["Section 4(g)"].

format is fundamentally entertainment programming. As such, its broadcast is completely irrelevant to a station's ability to broadcast, and its actual broadcast of, public service programming in fulfillment of statutory public interest obligations. Because of that fact -- that a station can carry home shopping programming as well as a

to stem from its communicative or persuasive effect on its intended audience...or indirectly by favoring certain classes of speakers over others..."^{9/} This content-based restrictive regulation clearly cannot be reconciled with the most fundamental of First Amendment principles.^{10/}

Section 4(g) likewise offends basic concepts of equal protection. The Supreme Court has held that "under the Equal Protection Clause, not to mention the First Amendment, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial

9/ Home Box Office, Inc. v. FCC. 567 F.2d 9. 47-48 (D.C.

views."^{11/} Contrary to this judicial direction, Section 4(g) accords disparate treatment to similarly-situated local broadcasters based solely on governmental judgment concerning the substantive merits of their entertainment programming, and confers a benefit on most stations but penalizes those which elect to provide home shopping programming. Constitutional equal protection guarantees forbid such discrimination.

Moreover, since the class of stations which are subject to this discrimination is limited to those affiliated with a single company, these constitutional defects are magnified: "Congress's exclusive focus on a single party clearly implicates values similar to those behind the constitutional proscription of Bills of Attainder."^{12/} In short, Section 4(g) is grossly inconsistent with basic constitutional principles.

Public Interest Considerations

Section 4(g) directs the Commission to consider the viewing of home shopping stations; other demands for the spectrum those stations now use; and those stations' role in providing competition for cable home shopping services. Nothing in the 1992 Cable Act's legislative history or in

^{11/} Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

^{12/} News America Publishing, Inc. v. FCC, 844 F.2d 800, 813 (D.C. Cir. 1988).

the plain terms of the statute, however, suggests that the Commission's considerations must or can be limited to those three factors. To the contrary, the Notice expressly invites submission of additional information to support the required public interest finding.^{13/}

-- Minority Ownership. In that regard, it should be noted that any discussion of operation in the public interest would be incomplete without mention of HSN's involvement in fostering minority ownership of television stations: no company in America has done more to encourage such ownership. These minority-owned stations have elected to broadcast a home shopping format and, in consequence, a determination that they are not operating in the public interest for purposes of cable carriage would have a devastating impact on minority television ownership, in direct opposition to Congressional goals in that regard.

-- Section 4(g) -- Audience. Review of Section 4(g)'s specific factors likewise supports a finding of home shopping stations' public interest operation. First, they enjoy significant viewing. For example, statistics submitted with SKC's comments herein concerning Home Shopping Club membership in each SKC Station's service area

^{13/} Notice, 8 FCC Rcd at 661. HSN understands that SKC as well as other stations affiliated with HSN are submitting comments which demonstrate their operation in the public interest.

demonstrate that a substantial proportion of market television households belong to the Club.^{14/} Since more people watch the stations than make purchases, it is clear that home shopping stations' audiences are substantial so that denial of mandatory carriage would deprive significant numbers of persons of access to desired programming.

The growth and popularity of HSN's two broadcast network services likewise establish the substantial -- and increasing -- audience for its entertainment programming.

However, determinations concerning operation in the public interest should not turn on the popularity of particular programming. The Commission has long held that it will not be the arbiter of what is good or popular programming, and making entitlement to mandatory carriage a function of program popularity is clearly inconsistent with both Commission precedent and constitutional requirements.

-- Section 4(g) -- Spectrum Demands. Second, there are no competing demands for the broadcast frequencies used by home shopping stations which are unique to those stations and which would justify disparate treatment for mandatory carriage purposes. Indeed, any conclusion that home shopping stations' frequencies should be reallocated to other uses based on program content is forbidden by the

^{14/} Persons who make a purchase automatically become members of the Home Shopping Club; membership is also open to anyone who requests it.

Constitution. The Commission has determined that issues relating to competing demands and alternative uses for television broadcast frequencies are best determined in rulemaking proceedings of general applicability, and such proceedings' conclusions must be applied to all television stations which operate on particular frequencies without reference to the content of their programming.

-- Section 4(g) -- Competition. Finally, HSN-affiliated stations afford the most direct and substantial off-air home shopping alternative to cable home shopping services. Mandatory carriage of such stations would not only ensure cable subscribers of continued access to their unique, locally-oriented public service programming, but would provide an alternative source of home shopping services.

A Denial of Mandatory Carriage Rights to Stations With Home Shopping Programming Would Be Unconstitutional

As discussed in detail in the Statement of Rodney A. Smolla in Support of the Comments of Silver King Communications, Inc., serious constitutional considerations preclude the Commission from reaching any conclusion other than that home shopping stations operate in the public interest, convenience and necessity.

(1) At the outset, this entire proceeding is constitutionally sensitive because it subjects one class of broadcasters, those offering a home shopping format, to

additional burdens not imposed on any other class of broadcasters based solely on the content of programming they offer. To the extent that section 4(g) is grounded in a belief by some members of Congress that home shopping formats do not serve the public interest, it comes dangerously close to constituting an unconstitutional Bill of Attainder.

(2) The public interest inquiry historically and properly has been an individualized inquiry engaged in during the normal licensing cycle. To make a class-wide determination in this proceeding that certain broadcasters are no longer operating in the public interest by definition would be to discriminate against one class of broadcasters by engaging in precisely the sort of content-based distinctions that the Supreme Court consistently has denounced.

(3) To conclude that home shopping broadcasters are operating in the public interest for purposes of licensing but not for purposes of must-carry eligibility would be to inject a content-based distinction into the public interest test that would operate to the detriment of only one class of broadcasters, those that have chosen a home shopping format. Government regulation that discriminates purely on the basis of the content of speech is per se unconstitutional.

(4) Discrimination based on the content of speech is impermissible even if the speech discriminated against is of a class with regard to which the First Amendment affords the government greater latitude to regulate. As the Supreme Court reaffirmed just last week in City of Cincinnati v. Discovery Network, Inc.,^{15/} if commercial and noncommercial speakers both contribute to the problem sought to be addressed by governmental regulation, the regulation cannot discriminate against the commercial speaker out of a perception that such speech is of "low value."^{16/} This would "attach more importance to the distinction between commercial and noncommercial speech than [the Supreme Court's] cases warrant and [would] seriously underestimate[] the value of commercial speech."^{17/} To be justified at all such discrimination must be based on a distinction between commercial and noncommercial speech that is related to a legitimate interest. Thus, assuming arguendo home shopping format broadcasters are engaged in commercial speech, the Commission cannot discriminate against them for reasons bearing no relationship to the rationale for providing greater latitude to regulate them in the first instance. The Commission cannot single out home shopping format

^{15/} No. 91-1200, slip op. (U.S. March 24, 1993).

^{16/} Id. at 8.

^{17/} Id.

broadcasters for specially disadvantageous treatment when the harm that it seeks to prevent -- impingement on cable operators' editorial discretion -- is caused by both commercial and noncommercial speech alike.

(5) Even if any disadvantageous regulation of home shopping stations is properly analyzed under the commercial speech doctrine, it would fail to pass muster. To the extent that home shopping broadcasters have been singled out in a manner that implicates Bill of Attainder and Separation of Powers concerns, it is doubtful that the governmental interests asserted are constitutionally legitimate at all, let alone "substantial." Any disadvantageous treatment of home shopping stations penalizes speech that is fully lawful, and not misleading or fraudulent, merely because of dislike for its content. Because the home shopping stations broadcast not just commercial speech but locally produced public interest programming that fully satisfies all of their obligations as public trustees, any denial of eligibility for must-carry status based on the content of their entertainment programming would fail the requirement that commercial regulation be narrowly tailored. Most fundamentally, denial of must-carry status to home shopping stations based on the commercial content of their entertainment programming would dramatically underestimate both the constitutional

protection for and public interest in HSN's commercial programming. The free flow of commercial information is guaranteed by the First Amendment, and is of vital interest to local and national economies.

**HSN Has Had and Continues to Have a Significant Impact
on the Development of Interactive Television**

Commercial or transactional interactive television is a trend that is sweeping the country - and for that matter, the world -- not only through home shopping programming, but also through game shows, infomercials and computer databases.^{18/} The various uses of interactive television cover a broad spectrum and, for instance, allow viewers to participate in game shows and trivia contests

successful venture that allowed viewers to participate actively in a live television program -- not just to buy products but also to communicate directly with on-air personalities whether that be to talk about local events or to find out more information about the product being advertised. In large part, HSN's tremendous success is attributable to viewer support and interest. Despite the stigma that at times attaches to home shopping programming because of its "commercial nature," it is immensely popular among television viewers who have found that the programming is a convenient and entertaining way to shop that provides them with direct contact with the people selling and advertising the product.

For the Commission to decide that home shopping programming is not in the public interest would be a tremendous blow to interactive television and, in particular, over-the-air interactive television. As Commissioner Duggan remarked in his speech to the International Radio and Television Society, television is moving toward increased transactional interactivity; indeed, "the age of [transactional] interactivity is already upon us,"^{20/} due in large part to HSN's innovation and experimentation. A determination that home shopping

^{20/} Commissioner Ervin S. Duggan, The New World of Television, Remarks before the International Radio and Television Society (Feb. 19, 1993).

stations, which are a substantial vehicle for over-the-air interactive programming, are not operating in the public interest would deny interactive television's significance as well as the critical role HSN will undoubtedly play in furthering the advancement of interactive technology.

**Denying Mandatory Carriage Rights to Stations
with Home Shopping Formats would have a
Devastating Impact on Minority-Owned Stations**

Congress and this Commission have repeatedly emphasized their concern with minority ownership of the media and have taken steps designed to encourage such ownership.^{21/} Reflecting its full support of these Congressional goals, HSN has done more than any single broadcast owner to further minority station ownership. At present, for example, HSN is affiliated with 30% of all minority-owned television stations in the country.^{22/} Action in this proceeding which disqualifies those stations

^{21/} See, e.g., Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849 (1982); Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes, Pub. L. 100-202 (December 22, 1987); 47 U.S.C. § 309(i)(3)(A) (1988); see also Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997 (1990).

^{22/} According to NTIA, there are 19 Black-owned television stations in the United States, seven owned by Asians and seven owned by Hispanics. National Telecommunications and Information Administration, "A Statistical Analysis of Minority-Owned Commercial Broadcast Stations Licensed in the United States in 1992" (November 20, 1992). Seven of the Black-owned stations, two of the Asian-owned stations and one of the Hispanic-owned stations are affiliated with HSN.

from must-carry eligibility would have a major adverse impact on minority television station ownership, a result directly in conflict with 25 years of affirmative regulatory policy.

Beginning in 1986 when it acquired its first station, HSN resolved to make affirmative efforts to expand the pool of minority-owned television stations, not only because it was a wise business investment but because it was the right thing to do. Since that time, HSN has funded the acquisition or construction of seven minority-owned television stations and has furthered the development of others through its affiliation agreements.

For example, with a \$5 million capital investment, HSN enabled Blackstar Communications, Inc. ["Blackstar"] to acquire three major market television stations: Television Station WBSF, channel 43, Melbourne (Orlando), Florida; Television Station WBSP, channel 22, Salem (Portland), Oregon; and WBSX, channel 31, Ann Arbor (Detroit), Michigan. Blackstar is now one of the largest minority-controlled group station owners in the country.

Roberts Broadcasting Company ["Roberts"] applied for a construction permit for a new station on channel 46 in East St. Louis, Illinois, in 1981, and after a long comparative hearing, was awarded the permit in 1987. The company, however, experienced difficulty in obtaining

financing and faced surrender of the construction permit. Then, in 1989, HSN provided a loan in excess of \$3.8 million to fund the construction of Roberts Broadcasting Company's television Station, WHSL-TV, East St. Louis, Illinois. WHSL-TV signed on in September, 1989, as the first new television station in the St. Louis market in 20 years. As the result of HSN's participation, WHSL-TV has provided new jobs and opportunities for the St. Louis community.

Jovon Broadcasting Corporation ["Jovon"] was awarded a construction permit for channel 62, Hammond, Indiana, in 1986. Like Roberts, however, it encountered severe difficulties in obtaining financing. In 1990, HSN loaned \$3.6 million to Jovon for construction of Television Station WJYS-TV (serving the Chicago market). That station began operations on March 3, 1991. The licensee's President and controlling shareholder has told the Senate: "WJYS-TV would not be on the air today...if Home Shopping Network had not financed and programmed the station."

Also in 1990, HSN entered into an agreement with Urban Broadcasting Corporation ["Urban"] to fund the construction of its new television station, WTMW, channel 14, Arlington, Virginia. HSN has committed over \$8.5 million dollars to this project and it is anticipated that this new television station -- the first Black-owned

commercial television station in the nation's capital -- will be on the air this year.

These stations' minority owners -- Roberts Broadcasting Company, Jovon Broadcasting Corporation and Urban Broadcasting Corporation -- had been awarded construction permits after years of litigation, but were unable to obtain financing to build their stations. Without HSN's financial, technical and other support, construction most certainly would not have begun and the minority-owned service they represent would not exist. The television stations funded by HSN represent nearly one-third of the Black-owned commercial television stations in the country. Since all have elected to adopt a home shopping format, a decision in this proceeding that such a format is inconsistent with the public interest would have a crushing negative impact on minority station ownership.

This adverse impact would not be limited to these stations, however: HSN entered into Television Affiliation Agreements with numerous other minority-controlled companies which enabled them to complete station construction and begin operations or to remain on the air. Among those companies are:

Racine Telecasting Company
Television Station WJJA-TV, Racine, Wisconsin

Ponce-Nicasio Broadcasting Ltd.
Television Station KCMY(TV), Sacramento,
California